Your essential insights into the latest in travel law

ABTA The Travel Association

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TRAVEL LAW TODAY

CHANGE IS ON THE CARDS
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Welcome

Welcome to this 4th edition of Travel Law Today which arrives as ABTA Members are getting ready for the major legislative changes that are coming up in 2018.

New Package Travel Regulations, data protection rules and restrictions on credit card charges pose challenges that must be addressed now if companies are to be able to trade confidently. What Brexit means for staff in the UK remains unclear. But is there reason to be positive about the recent developments in gastric illness claims?

Once again, we are extremely grateful to the ABTA Partners who have contributed to this edition. I hope the following articles tackle the current issues and that the ABTA Conferences and Events programme will be a valuable part of your preparations for what promises to be a busy year ahead.

Simon Bunce,
Director of Legal Affairs, ABTA

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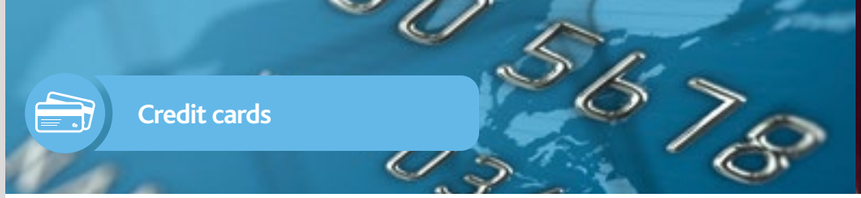

Change is on the cards

Paula Macfarlane Senior Solicitor, ABTA

Paula has 16 years' experience advising ABTA Members on travel law including package travel, ATOL, consumer law, booking conditions, advertising and data protection. She runs ABTA's Code of Conduct processes and writes the Business Support Manual, a weighty guide for Members on the varied laws that affect their travel businesses.

The travel industry has had a difficult time in recent years over the charging of fees where customers wish to pay by credit card. The current law, which restricts the amount of any fee to the amount of any charges incurred by the trader, has been widely misinterpreted by consumers and the press and we have seen articles accusing the travel industry of ripping off customers by charging fees. Whilst all sectors of commerce are subject to these rules, it is the high average transaction values of holidays that make this a much more visible issue in the travel industry.

And the story is not over yet. The Payment Services Directive 2 comes into effect from 13 January 2018 and, from that date, businesses will not be able to charge any fees for taking payment by personal debit and credit cards when selling goods or services. Again, this doesn't just affect the travel industry; it applies to payments for all goods and services.

Why is this happening?

In December 2015, EU rules put a cap on the level of interchange fees that could be charged for any card transaction. Interchange fees form part of the merchant service charge paid by businesses to their payment service providers. The EU believes that, as a result of that cap, charges faced by businesses should have reduced and there should be less need to pass these costs on to consumers by way of separate fees for paying by card.

However, as the cap was expressed as a percentage of the transaction value rather than a fixed amount, the level of charges faced by travel companies has not reduced and, in many cases, has increased. For example, interchange fees on debit cards used to be 8p and are now 0.2%. Therefore, the interchange fee on a £1,000 booking has increased from 8p to £2.

What cards are affected?

The ban on charges will apply to all personal credit and debit cards, including American Express, but does not apply to commercial cards which are cards issued to businesses which are limited in use for business expenses where the payments made with the cards are charged directly to the account of the business.

The ban applies to PayPal too, and other arrangements for making payments such as Apple Pay. The new Regulations are written widely and will catch any personalised device or personalised set of procedures used to initiate a payment order.

Does the ban only apply to customers in the EU?

The new law will be based around whether the payment service providers of both the payee and the payer are located in an EEA state. If your provider is based in an EEA state (EU countries plus Iceland, Liechtenstein and Norway) then:

- The ban will apply where your customer's card is from a provider based in the EEA
- If the customer's card is from outside the EEA then the total ban on charging won't apply. The current rules will however apply – that you can charge a fee but only at a level to cover your costs.

What should you be doing now?

Prepare for the fact that, from 13 January 2018, when a client pays with a personal credit or debit card, unless your payment service provider, or the customer's payment service provider is based outside the EEA, you won't be able to charge them a card fee.

If you set your own selling price, you may choose to increase headline prices to deal with this loss of revenue.

If you're an agent that can't control the price, you might consider charging a booking fee. This would need to be applied to all bookings, not just those where payment is taken by card. If you applied a booking fee only where a card was used, this would be the same as charging a card fee and would breach the new law. Consider if you will offer clients other methods of payment such as bank transfers if these are lower cost for you. Consider if you will be able to offer incentives to your clients to use payment methods other than cards. The latest advice from the Government is that you can offer non-monetary incentives, such as free access to airport lounges for example, but that money off incentives are likely to breach the law.

It's important to shop around when selecting a merchant acquirer. You might be able to find a better deal to lower your costs.

Is this the end of the story?

When the Directive was being approved by the EU, ABTA spelled out the negative impact of a ban on card charges on the travel industry. In common with most consumer legislation, it can be very difficult to get the EU to overturn any legislation that they view as beneficial for consumers. Although we were not able to overturn the ban, we did manage to maintain the right for businesses to refuse card payments, or to encourage customers to use other methods of payment available.

We are continuing to raise our concerns with the Government about the issue of interchange fees and the high costs incurred by our Members when taking card payments. Meetings with the Treasury have achieved a recognition by them that interchange fees have increased, and statements that the Government is committed to engaging with industry on the issue, and will be encouraging the Payment Systems Regulator (PSR) to conduct a review of the business impacts of the Interchange Fees Regulation. However, any change will not be immediate and all companies should plan for the changes to come in January.

PTR T&Cs for reluctant organisers

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Claire advises on all types of commercial agreements and business transactions. These include share sales and acquisitions, share schemes including EMI, company reorganisation and airline charter, agency, supplier and partnership agreements. She also specialises in travel regulatory advice.

The new Package Travel Regulations come into force on 1 July 2018. As ought by now to be well known, the definition of a 'package' under the 2015 Package Travel Directive has been significantly extended. Accordingly, the type and number of travel businesses who will be organisers going forward will be greatly increased. These will include companies who have historically traded as agents for the third party suppliers where, amongst other scenarios, the minimum of two different types of travel service are purchased from a single point of sale and are selected before the traveller agrees to pay. No amount of imaginative drafting is likely to change this reality.

Check your business model

Many of those operating with an agency business model may still be in denial as to their contractual responsibilities and liabilities post 1 July 2018, but there seems little doubt that these must now be faced up to, including in relation to the terms and conditions and other documentation they will need in their brave new trading environment. It is clear from the consultation which has just closed that the UK government intends, as could be expected, to very largely apply a cut and paste approach to the Directive in relation to implementing legislation. Although draft regulations have yet to be published, there is no reason to delay consideration of the compliance steps now required given the relentlessly diminishing timescales.

It is worth at this stage briefly reflecting on why 'new' organisers need to have terms and conditions which take account of this role. As a general rule, there is no doubt that the objective of protecting your legal position is best served by acknowledging your responsibilities and then drafting to manage these, as far as the law allows. Many limitations and exclusions of, and defences to, liability will only be available if specifically written into the applicable conditions. Other rights, such as the ability to rely on (reasonable) sliding scale cancellation charges, will only arise if specifically reserved in the contract. More particularly for package travel arrangements, the regulations will require that the 'package travel contract' sets out the full content of the agreement including all prescribed information (of which there is a great deal). This information includes a statement of the organiser's responsibility for the proper performance of all travel services included in the contract in accordance with the detailed provisions of the Directive on this.

Check your booking conditions

So, comprehensive and carefully drafted booking conditions which are tailored to the particular arrangements the organiser will be offering to the public will be a necessity. As mentioned, these must take full account of not only the specific requirements of the Directive and new UK regulations but also the particular travel services which will be included in the package. The issues which these conditions will need to address include the following:

- Responsibility for proper performance of the contracted services including notification of any lack of conformity
- Alteration of the terms of the contract and cancellation by the organiser
- The traveller's right to cancel and the cost implications of doing so
- The traveller's right to transfer their contract
- The obligation to provide assistance to a traveller in difficulty
- Complaints procedure
- Insolvency arrangements.

The new Directive is a great deal more comprehensive and creates a much more prescriptive and restrictive regime than that applicable under the 1992 Package Travel Regulations. The terms and conditions required to comply with, and to provide the organiser with protection in respect of, this new legal environment will need some careful thought and not simply the adoption of a set of existing tour operator booking conditions. For those companies who are already operating part of their business on a principal organiser basis alongside an agency model, the package conditions they are currently using will need a detailed review and overhaul before being applied across the business.

Check your other paperwork

Booking conditions are of course the key contractual document which will require attention. However, there are others. Consideration also needs to be given to supplier and agency agreements, confirmations, invoices, website terms and the prescribed pre-contract information. The scale of the time and effort required should not be underestimated. It should also be remembered that assuming, as expected, the new regulations apply to bookings made from 1 July 2018; travellers booking from that date will get the full benefit of their enhanced rights irrespective of when they started researching their booking and what the terms and conditions may say at the time they first looked at brochures or a website. At the very least, it is time to start the process of understanding what compliance will be required for businesses.

FURTHER INFORMATION

For further information on the Package Travel Directive visit:

abta.com/memberzone

Find out more about the new Package Travel Regulations by attending ABTA's conferences and events. Visit:

abta.com/events

It's a package but the regulations don't apply

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Article 2 of the Package Travel Directive 2015 (PTD) outlines a number of exemptions where packages are being sold but to which the PTD doesn't actually apply, some existing ones carried over from the current regime and some new ones. The inclusion of an Article outlining the scope of the PTD is in itself very welcome as under the current Package Travel Regulations 1992 (PTRs), the scope had to be deduced from the definitions! The scope of the new PTD is therefore already considerably clearer than the current position.

One new exemption under the PTD, and perhaps the one that's invited the most interest, is that of business travel sold under a "general agreement". Section 2(c) stipulates that the PTD shall not apply to *"packages and linked travel arrangements purchased on the basis of a general agreement for the arrangement of business travel between a trader and another natural or legal person who is acting for purposes relating to his trade, business, craft or profession"*.

Excluding business travel

Exclusion of business travel from the UK's regulatory regime is nothing new. The Civil Aviation (Air Travel Organisers' Licensing) Regulations 2012 (best known quite simply as the ATOL regs), already excluded business travel from its scope, stating that anyone who made flights available to corporate bodies was exempt from the requirement to hold an ATOL. However the ATOL regs made it clear that the exemption only applied where flights were not sold as part of a package and it must be made clear on the invoice or receipt that the flight was not ATOL protected. So, the PTD follows where the ATOL regs lead, with one very important distinction, which is the requirement for the corporate travel management company (TMC) to have a 'general agreement' in place with the customer.

So, what is meant by a 'general agreement'? Referred to as a 'framework agreement' in previous drafts, the Commission may have thought that changing it to 'general agreement' clarified what was meant by this however I'm not sure it does! One can only assume (and hope!) that a standard commercial agreement or set of terms and conditions, outlining the terms upon which the TMC provides business travel arrangements to the customer, will suffice. Having raised this matter with the DBEIS, they've advised us that some guidance will be provided around this point in due course.

Exemptions of ATOL for corporates

Another important distinction from the ATOL regs exemption, is that where the ATOL regs exemption applies only to 'corporate bodies', the PTD exemption applies to any "natural or legal person" who is acting for purposes relating to his trade, business etc. and where a general agreement is in place. The preamble to the PTD makes it clear that the exemption shall not apply to sales made to business travellers where there is no general agreement in place; stating that these business travellers, often from small businesses or self-employed and booking business travel through the same channels as "normal" consumers, should be afforded the same protection as that offered to "normal" (e.g. leisure) consumers.

Most TMC's already have a model in place which avoids ATOL, both due to the corporate sales exemption but also due to the IATA exemption, with the vast majority of TMC's being IATA ticket agents. Further, most TMC's sell business travel as separate and independent components so as to avoid the application of the PTRs, the need for advertising or offering travel services at an inclusive price not being as critical or important when selling to business travellers. So, will this new exemption really have that much of an impact on TMC's after all? Of course, it means they can sell the travel components at an inclusive price if they really wanted to without having to worry about package regulations but otherwise, I would argue possibly not!

Moving on, the PTD continues and builds upon the current exemption for packages offered "other than occasionally" under the existing PTRs. Crucially though, the PTD is much more specific with this exemption, stating that packages offered (or LTA's facilitated) "occasionally and on a not-for-profit basis and only to a limited group of travellers". Therefore, there are three elements to this exemption for it to apply; it must be "occasionally" and "on a not-for-profit basis" and "only to a limited group of travellers". Only upon satisfying these three elements will the exemption apply to a package organiser. Critically, and again, very much welcome, is some guidance around this exemption in the preamble to the PTD – something which was sorely needed under the current regime. The example given is that of a charity, school or sports club organising trips for their members/students, a few times a year, without them being offered to the general public. This clarification means that those clubs who were previously inadvertently brought within the scope of the PTRs due to the ambiguity of "other than occasionally" can now confidently rely on this exemption under the PTD, provided they meet its three requirements.

Time limits

Lastly, the PTD continues the existing exemption of those trips which do not cover a period of 24 hours unless they include overnight accommodation. Specifically, the PTD will not apply to packages (or LTA's) *"covering a period of less than 24 hours unless overnight accommodation is included"*. Again, worded in a way which is much clearer than the existing exemption, although having the same effect, these short term trips continue to remain outside the scope of package regulation.

Force majeure – when the unexpected happens

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It has been a terrible year for holiday disruption, with ABTA's news service constantly bringing us advice about the latest terrorist attacks, natural disasters, civil unrest and strikes, to name but a few. These events bring chaos to holidaymakers, ranging from uncertainty about the viability of forward bookings to life-threatening situations in resort.

Sadly, ABTA and its Members are well accustomed to dealing with such incidents, taking the lead in keeping customers safe, bringing them home and rearranging forward bookings. Typically, the driver for such action is not a concern about legal exposure but a genuine desire to put the customer's interests first, often taking a financial 'hit' in so doing. Perhaps this is why there is such a paucity of reported cases dealing with the obligations of tour operators towards their customers in the event of such disasters, or as we lawyers call it, when there is an event of force majeure.

The Package Travel Regulations 1992 (PTR) and the new Package Travel Directive (PTD) both contain specific rules which apply when there is an event of force majeure, although there are differences. This article shall explore some of these differences.

The definition remains (roughly) the same

The PTR defines force majeure as "unusual and unforeseeable circumstances beyond the control of the party by whom this exception is pleaded, the consequences of which could not have been avoided even if all due care had been exercised."

In the event of such unusual and unforeseeable circumstances, the PTR allows tour operators to make significant changes to the package holiday pre-departure, or to cancel, without having to compensate the customer. The tour operator is also released from any liability for a failure to provide the package holiday contracted for, although the tour operator will still have to give prompt assistance to any customers in difficulty in resort. The intention of the PTR is clear: tour operators should help customers affected by an event of force majeure, but they should not be liable to compensate the customer because ultimately it is not the tour operator's fault.

The definition of force majeure under the New PTD is slightly different. It is this: "*unavoidable and extraordinary circumstances* means a situation beyond the control of the party who invokes such a situation and the consequences of which could not have been avoided even if all reasonable measures had been taken."

We therefore have "extraordinary" instead of "unusual", but this is unlikely to represent any material difference in practice. What is more interesting is use of the word "unavoidable" instead of "unforeseeable", which at first glance appears to represent a significant change. It appears to suggest that tour operators can claim force majeure even if the relevant incident was foreseeable when the holiday was sold, provided that it was unavoidable.

That does not feel right, particularly because it would allow tour operators to sell packages they suspected would end in disaster and then claim relief from their various obligations on grounds of force majeure. It seems far more likely that a court would consider "unavoidable" to include within it an element of unforeseeability. To put it another way, a foreseeable event is always avoidable – either by putting in place some contingency plan, or by simply not selling the package in the first place.

Similar relief for the tour operator in the event of force majeure

In the event of such unavoidable and extraordinary circumstances as described above, the new PTD again allows the tour operator to make significant changes to the package holiday pre-departure, or to cancel, without having to compensate the customer. Similarly, a customer will not be entitled to claim compensation against the tour operator for a failure to provide the services contracted for if that failure was caused by unavoidable and extraordinary circumstances.

We also find use of force majeure in two other parts of the new PTD. The tour operator will not be liable for any booking errors caused by unavoidable and extraordinary circumstances. Also, where unavoidable and extraordinary circumstances make it impossible for the tour operator to fulfil its obligation to bring home the customer, the tour operator may limit the costs of having to put up the customer in accommodation to three nights per person (although there are certain carve-outs, for instance this rule does not apply to persons with reduced mobility).

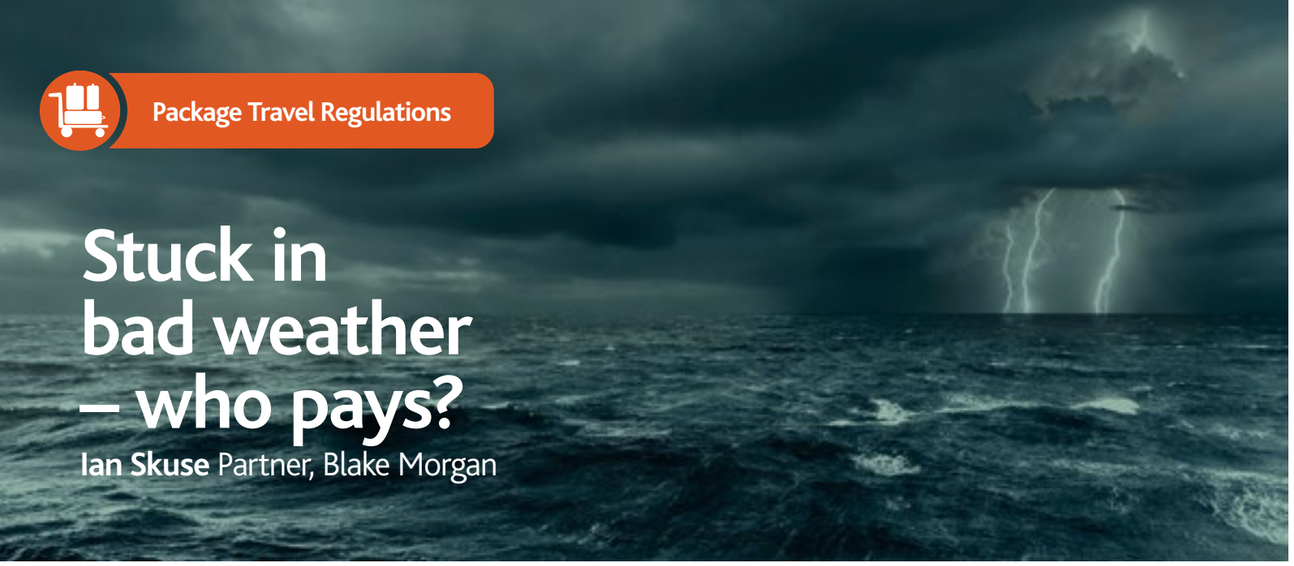
Importance of carefully drafted booking conditions

One of the most commonly talked-about but misunderstood provisions in the new PTD is the right for the customer to cancel the package pre-departure, with a full refund and without having to pay a cancellation fee, in the event of force majeure "occurring at the place of destination or its immediate vicinity". At first glance, this would appear to provide very wide-ranging "free cancellation" rights for the customer. It would appear to allow customers to cancel even where the relevant event does not impact on the resort itself, but somewhere else which is within "its immediate vicinity".

A closer look at the new PTD reveals that the position is not quite that stark. In fact, the force majeure event must also significantly affect the performance of the package or the carriage of passengers to the destination. Accordingly, even if an event of force majeure occurs at the destination itself, it must be one which has a significant impact on the tour operator's ability to provide the package before the customer can exercise the free cancellation rights. This additional requirement is important and tour operators should ensure that this finds its way into the booking conditions, as without it the customer cancellation rights are far broader than they are under the new PTD.

Conclusion

It is a feature of the travel industry that disasters will occur from time to time which will impact on the tour operator's ability to provide the package holiday. The PTR has always recognised that, in these situations, tour operators should be released from some of their package obligations. This concept continues under the new PTD, although there are some subtle differences which I would urge tour operators to ensure are reflected carefully in their booking conditions.



Package Travel Regulations

Stuck in bad weather – who pays?

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Ian has been a travel and aviation lawyer for more than 30 years. He provides regular corporate and commercial legal advice to scheduled airlines, tour operators, travel agents and for business travel, to travel management companies. This advice includes M & A in all travel sectors, commercial agreements, and regulatory issues.

"Extraordinary circumstances" may not be as rare as they should be. Massive disruption was caused by the Icelandic ash cloud and more recently hurricane Irma saw thousands of flights cancelled and travellers stranded. Overlapping obligations between travel organisers and carriers need to be understood. Freak weather means additional costs for travellers with meals, refreshments and accommodation required – but who is to pay?

The following are relevant:

- Montreal Convention 1999 dealing with flight delays
- Regulation 261/2004 relating to delayed flights
- Package Travel Regulations 1992 and the PTD 2015
- Interpretative Guidelines on Regulation 261/2004.

Disruptions caused by extreme weather are unexpected and unavoidable. Extreme and relatively rare, disruption can arise in other circumstances such as air traffic control strikes, war, bird and lightning strike to aircraft and unexpected crew illness. These may well give rise to extraordinary circumstances resulting in disrupted journeys and stranded passengers. We need to analyse liabilities for tour operators, and airlines and who might be responsible for the cost of delays.

Montreal Convention 1999

Article 19 states that the carrier is liable for damage occasioned by delay but is not liable if it took all reasonable measures to avoid the damage, or that it was impossible for it to do so. Montreal is subject to strict time limits (including a two-year limitation period) and a liability cap of 4,694 Special Drawing Rights per passenger (currently equivalent to £4,926). Montreal claims for delay relate only to actual proven loss and not any indirect loss or consequential damages.

EU Regulation 261/2004

These provide fixed levels of compensation for passengers where their journey is delayed or cancelled resulting in their arrival time being more than three hours later than scheduled. Passengers are also entitled to receive the "right to care" when they should be offered free meals and refreshments; hotel accommodation where a stay of one or more nights becomes necessary and transport between the airport and hotel. This is required even when the delay arises from extraordinary circumstances.

It is this cost of care which causes the most significant loss. There are no guidelines regarding the cost of accommodation that might be appropriate, or the management of passengers remaining in expensive resorts rather than at an airport hotel, or those making alternative measures to return home by other means.

Package Travel Regulations 1992

Regulation 14 of the Package Travel Regulations applies where, after departure, a "significant proportion of services are not provided". In these circumstances, the organiser is obliged to make suitable alternative arrangements, at no extra cost to the consumer, for the continuation of the package. Regulation 14 goes on to say that where alternatives are not possible or unacceptable to the consumer for good reason, the organiser will provide the consumer with equivalent transport back to the place of departure.

ABTA guidance in its Code of Conduct states that if an "outbound flight delay is long enough to mean a significant change to the travel arrangements, then clients are entitled to have a refund". This is where a client requests it and the guidance states that in that case it should be granted.

ABTA's guidance also refers to problems with a return flight caused by unexpected bad weather or industrial action, then the tour operator isn't obliged to pay for the additional days that the client must stay at the destination as the holiday is at an end and the only remaining part of the contract is the return flight. Whilst the tour operator must ensure that the return flight occurs, the client is responsible to cover the cost of accommodation until they can fly home.

PTD 2015

Article 13 provides that the organiser must give appropriate assistance to the traveller in particular in circumstances where the traveller's return cannot take place due to extraordinary circumstances, when the organiser shall bear the cost of necessary accommodation, if possible of equivalent category, for a period not exceeding three nights per traveller.

Interpretative Guidelines relating to 261/2004

These Guidelines throw some light on how the overlap between a tour operator and an airline might be managed and confirm that passenger rights in 261/2004 apply to flights within a package tour, and do not affect rights granted under the Package Travel Directive. In principle, passengers have rights both against the package organiser and against the carrier. Article 14(5) of PTD 2015 confirms that any right to compensation or price reduction does not affect the rights of travellers under 261/2004 but any compensation or price reduction granted shall be deducted from each other in order to avoid "over compensation".

The Guidelines confirm that neither PTD 2015 nor 261/2004 deals with whether it is the organiser or the carrier ultimately bearing the costs for these overlapping obligations. It is suggested that contractual provisions between operators and carriers will resolve who should pay.

So where does this leave us?

Given the potentially massive liability for care for delayed passengers, it is the contract between operators and carriers which is critical. Many seat commitment agreements and charter arrangements will carve out the potential liability under 261/2004 and pass this entirely to the organiser. Tour operators may encourage passengers to make claims against airlines or to check in at the airport to trigger potential claims for right to care. For those without contractual provision, there is nothing to prevent the organiser or carrier from seeking to recover from the other the costs of care incurred particularly where there is the overlap. For travel lawyers this is an area where indemnities in contracts need to clarify who has to carry the can.

Data protection

Using contracts to protect your data

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Alexandra advises businesses on intellectual property law, technology and commercial matters, particularly in the travel and leisure industry. She has experience advising senior management on the full ambit of cyber security and data protection matters.

The travel industry is, by its very nature, concerned with the collection, storage and processing of customer personal data (any data from which an individual can be identified such as a name, address or passport details). The implementation of the EU General Data Protection Regulation (GDPR) in May 2018 will significantly change the current data protection regime. It is vital organisations in the travel sector ensure the contracts they have in place with third parties who are handling, processing and storing customer personal data on their behalf, or providing personal data, are up to date and compliant.

Contracts which involve the transfer of personal data to third parties should currently contain clauses obliging each party to comply with the Data Protection Act 1998 (DPA) and Privacy and Electronic Communications Regulations. However, under the GDPR, such cursory clauses will not be adequate to ensure compliance with the enhanced data protection obligations on data controllers (persons/companies who determine how personal data is to be processed) and data processors (persons/companies who process data on behalf of the data controller).

Organisations should ensure their contracts with third parties contain comprehensive data protection clauses which spell out the specific obligations on the third party regarding obtaining, storing, processing and transferring personal data. It is also important to have a separate privacy policy which sets out how your organisation complies with data protection legislation, including the procedures and steps taken to protect personal data. Third parties should be contractually obliged to comply with this policy.

The following areas are important to include when drafting robust data protection provisions.

Accountability

Under the GDPR, organisations will need to maintain accurate and detailed records of all processing and storage of personal data, demonstrating compliance with the data protection principles. Any third party data processor should be contractually obliged to keep a record showing how it is complying with the data protection principles (as they are applicable to the processor) and to make such records available to the data controller and any supervisory authority (the Information Commissioner in the UK) for the purposes of an investigation.

Consent

Where an organisation obtains personal data from a third party, that third party should warrant they have obtained all necessary consents from the relevant individuals to process this personal data. Under the GDPR, consent must be clear and unambiguous and must be active (e.g. not inferred from silence or obtained through pre-ticked boxes). Parental consent is required for children under the age of 16 where personal data is obtained via online services.

Notification

Organisations will be obliged to report any data protection breach to the Information Commissioner. Any third party processor should therefore be contractually required to report any breach of its data protection obligations to the data controller and to assist with any notification to the authorities. Failure to notify the relevant authority can lead to fines of up to €10 million or 2% of global annual turnover, whichever is greater.

Transfer outside of the EEA

Data processors should be prohibited from transferring personal data outside the EEA without the consent of the data controller and without adhering to the Information Commissioner's guidance and codes of practice on transferring personal data overseas.

Access by employees and subcontractors

Your contract should expressly prevent any of the processor's employees or subcontractors from accessing the personal data unless they are authorised and require access to meet the processor's contractual obligations and are informed of the confidential nature of the personal data.

Data subject access requests

Individuals will have the right to request a copy of their personal data, free of charge, in an electronic format. The data processor should be contractually obliged to cooperate fully with any data subject access request, and report any such request to the data controller if such request is received directly.

Storage period and erasure of personal data

Subject to certain conditions being met, a data subject has the right to request their personal data is erased. It is therefore important the data processor is required to provide full and open cooperation and assistance in ensuring the relevant personal data is deleted. The data processor must only hold the data for the time period specified in your privacy policy.

Indemnity

It is critical the processor gives an indemnity to the controller against all liabilities, costs, expenses, damages and losses suffered or incurred by the data controller arising out of or in connection with any breach by the processor of any of its data protection obligations. This gives you recourse against the processor in the event the processor breaches any of its data protection obligations and may give you quicker, easier, fuller recovery than a claim for breach of contract.

Under the GDPR, organisations can be fined up to €20 million or 4% of global annual turnover whichever is the greater, for breaches. Not having the appropriate contractual protection could be hugely costly, particularly for large travel organisations. It is critical for data controllers to ensure they a) spell out the data protection obligations to the data processors they are engaging, and b) adequately cover off their liability in the event of any breach by the data processor of such obligations. The reputational costs of a data protection breach can be just as costly and setting out each party's obligations at the outset of a contractual relationship could be invaluable.

Although the GDPR does not take effect until next year, most contracts in force or being negotiated will continue well beyond May 2018 so it is important to start future proofing your contracts for the GDPR now. Seeking professional advice is advisable and we are already working with organisations in the travel industry to review their contracts and draft appropriate model clauses and privacy policies to protect those businesses into 2018 and beyond.

Data protection

Sending data overseas

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Javed is a lawyer with Hill Dickinson. His particular expertise covers travel law, commercial contracts, media law and regulatory compliance, visas and immigration. His clients are major cruise operators, P&I insurance clubs and certain UK ports.

The GDPR comes into force in the UK and across the EU in May 2018. The regulations offer greater rights to data subjects and more reporting requirements for companies that transact with and collect data from EU customers and suppliers. Under GDPR there will be joint and several liability on both data controllers and data processors.

Where personal data moves across borders outside the UK and EU this may put at increased risk the ability of customers and other data subjects to exercise data protection rights in particular to protect themselves from the unlawful use or disclosure of their personal information. At the same time, supervisory authorities may find that they are unable to pursue complaints or conduct investigations relating to the activities outside their borders.

Chapter V of the GDPR governs the transfer of personal data to third countries (non-EU countries). This says that any transfer of personal data to a third country, including the onward transfer of personal data from that third country to another third country, shall take place only if the conditions laid down in Chapter V are complied with by the controller and processor.

The Chapter V conditions are:

1. A transfer of personal data to a third country may take place where the EU Commission has decided that the third country in question ensures an adequate level of protection. Such a transfer will not require any specific authorisation.
2. The Commission will publish a list of the third countries which it has decided offer an adequate level of protection and those that, it decides, no longer offer that protection.
3. The following countries outside of the EU currently have data protection laws that fully comply with the requirements of the EU and have passed laws which meet the principles of the GDPR: Norway, Liechtenstein, Iceland, Andorra, Argentina, Canada, Faroe Islands, Guernsey, Israel, Isle of Man, Jersey, New Zealand, Switzerland, Uruguay and USA.
4. Where there is no adequacy decision in respect of a country, the controller or processor must ensure that there are adequate safeguards for the transfer of data.
5. Adequate safeguards can include the use of standard data protection clauses adopted by the Commission or a supervisory authority and approved by the Commission.
6. In the absence of an adequacy decision or appropriate safeguards a transfer of personal data to a third country shall only take place on limited conditions including:

   a. Where the data subject has explicitly consented to the proposed transfer, after having been informed of the possible risks of such transfer for the data subject due to the absence of an appropriate Commission decision and appropriate safeguards; or
   b. Where the transfer is necessary for the performance of the contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject's request; or
   c. Where the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person;
   d. Where the transfer is necessary for the establishment, exercise or defence of legal claims;
   e. Where the transfer is necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent.

Under Article 30 of the GDPR certain organisations that are data controllers are required to maintain a record of the processing activities that they carry out or which are under its responsibility. This record must include the categories of recipients to whom the personal data has been or will be disclosed, including where applicable recipients in third countries and the identification of those third countries and of any appropriate safeguards.

These obligations will not apply to an enterprise or organisation employing fewer than 250 persons unless the processing it carries out is likely to result in a risk to the rights and freedoms of data subjects, the processing is not occasional, or the processing includes special categories of data or personal data relating to criminal convictions and offences.

The Chapter V conditions are in addition to the general principles for processing data which require that personal data is processed fairly and in a transparent manner; is only processed for specific, explicit purposes; is adequate and not excessive; is not kept for longer than is necessary; and is subject to adequate security.

It is vital that you start to review your contracts in conjunction with your suppliers, including those suppliers that are based overseas, and ensure that you introduce adequate security measures so that your suppliers are fully committed to securing and safeguarding the data that you will be sharing with them. Where the supplier that you are dealing with is not in a country that has adequate levels of data protection you should implement measures to compensate for the lack of data protection by way of appropriate safeguards for your customers.

Such safeguards may consist of making use of binding corporate rules, standard data protection clauses or contractual clauses. Those safeguards should ensure compliance with data protection requirements and the rights of the data subjects appropriate to processing within the UK or EU.

For further information on the **General Data Protection Regulation (GDPR)** Guidance visit: **abta.com/memberzone**

Register for ABTA's event – **Data protection and cyber security in travel** on 1 February 2018. Visit: **abta.com/events**

Data protection

Protecting against cyber threats

Debbie Venn Partner, Head of Commercial and Technology, asb Law

Debbie is a specialist (recognised in Chambers & Partners and Legal500) in commercial law, contracts, intellectual property, information technology, cyber security and data protection; with particular expertise in the travel industry. Debbie has advised travel businesses over many years on T&Cs, travel regulations, data protection, IT, information security and privacy issues.

The consequences of a cyber attack have been brought into sharp focus in recent months, particularly when the NHS fell victim to a ransomware attack in the WannaCry incident. In 2017, an estimated 5.6 million incidents of fraud and computer misuse offences were reported. Sadly, cyber attacks are on the up and growing in sophistication and frequency. Prevention is often better than cure, although sometimes your best efforts will not stop a determined cyber criminal. So what should you be aware of to try and reduce risk as much as possible to protect your business information, data and systems.

What is cyber crime/attack?

Data is a valuable business asset and developments in technology and a changing landscape on how businesses store, hold and transfer data mean that data is often in many different places; and, in the travel industry in particular, in different countries with different levels of data security. Use of third party IT providers or hosting platforms (e.g. the cloud); will mean that data is unlikely to be in your direct control. This makes it easier for someone to try to gain unauthorised access to your data.

Examples of types of threats that might appear in a 'cyber' environment are:

- Denial of service attack: network flooding causing overload and shut down
- Hackers obtaining access through system vulnerabilities
- Phishing: generally emails sent to acquire sensitive information (e.g. passwords) by masquerading as a trustworthy entity
- Ransomware: attacks and infects a computer, encrypting files located and holding them to ransom, demanding money (usually in bitcoins) to gain access and decrypt the data.

All quite nasty stuff and your IT teams should be able to explain the systems security that you have in place to try and combat cyber attacks. However, a larger vulnerability is often people in the organisation who accidentally let attackers in to their systems and network. People in an organisation therefore need to be made aware of your organisation's cyber security measures and be vigilant to potential attacks and communications that they might receive (such as a phishing email) so they can alert IT and shut the attack process down swiftly.

What can I do to improve cyber security?

The National Cyber Security Centre gives ten useful steps to be cyber secure: www.ncsn.gov.uk. The key steps include:

- Get your network secure
- Educate your users
- Get prevention mechanisms in place
- Have a plan to manage incidents and follow it
- Monitor systems and procedures carefully
- Have policies in place
- Set up a risk management regime to fit the risks of your business.

For travel businesses, there are key considerations around data flows, including passing passenger information to authorities, hotels, airlines or other providers of services that are outside your organisation. You should map the data flow of your organisation so you know where the vulnerabilities to cyber attack might exist (technical and physical), to ensure that this forms part of your cyber security policy and risk management regime. Once data mapping is complete, conduct a risk assessment to also form part of your internal data protection and cyber/IT policies, which should be monitored, maintained and updated as necessary to keep up-to-date with new technologies and ways of working. It will also help feed into your disaster recovery and business continuity policies.

Cyber insurance

You should check whether your existing insurance policies include cyber cover, or whether you need to take out specific cyber insurance. Any cyber insurance cover you have should cover the risks applicable to your business and therefore should be checked against the risk assessment that you have carried out on the organisation. Cyber insurance can help with not only dealing with the costs associated with a cyber attack, but also the costs of controlling and managing the attack, PR costs and dealing with reputational issues and potentially damages for breach of data protection or confidentiality. There may also be fines to regulators, such as the Information Commissioner for data protection breach (exacerbated by GDPRs). Your policy should be checked to see what help you can get if something goes wrong.

If something happens, actions to take:

- Immediately protect your business from further attack
- Investigate what happened, when, how, who was affected and what was lost, damaged or compromised
- Notify under any insurance policy covering cyber crime and see if they can offer you help with damage control
- Issue communications internally to relevant staff, suppliers, etc.
- Consider and carefully put together an external communication to customers and those affected
- Check affected contracts
- Inform regulators, those affected, even the police
- Implement measures to prevent an attack.

Checklist

1. Undertake a risk assessment on your cyber and security environment.
2. Design appropriate processes and policies for dealing with information security (including how to deal with home and mobile working and data transfer to other third parties and countries).
3. Train and create awareness in your organisation around the importance of adhering to the policies and processes to keep systems secure and create vigilance.
4. Regularly review and update for organisational changes and identify and deal with new risks.
5. Assess security having regard to the technical state of the art and apply budget to implement and maintain systems security based upon any updates on risk profile for the business.

Employment law

Employment law today

Rebecca Thornley-Gibson
Partner, Ince & Co LLP

Rebecca is an Employment Partner at Ince and Co. Rebecca works in the travel sector with European airlines, global tour operators and suppliers to the sector. Clients include membership organisations, travel technology companies and senior executives.

Whilst there is regular and substantial change in employment law issues there are two topics that are proving a constant in discussions for employers at the current time: what will be the Brexit impact and how do we adapt to changing workforce models?

Will Brexit break our employment laws?

We remain subject to a daily dose of Brexit confusion and knowing what will happen to our employment laws still remains uncertain. Whilst we know the Great Repeal Bill will convert current EU employment law into domestic law post Brexit we don't have the full picture as to whether this will be an opportunity for de-regulatory reform or a gold plating of what we have become used to.

The three areas below are likely to see change post Brexit.

1/ Working time regulations

Employers are familiar with the concept of a maximum 48-hour working week. Within the travel industry this is not always easy to achieve on a consistent basis and opt outs are widely used. It is possible that Brexit may give an opportunity to remove the mandatory 48-hour week but this will not give employers a licence to increase hours to dangerous levels. Employers have a duty to provide a safe system of work and ensure health and safety obligations are observed and anything that breaches this duty such as overworking employees will create a risk of employee claims.

It is not expected that the amount of annual leave will be increased beyond the statutory 28 day minimum in the UK but recent court judgments have confused how annual leave should be paid. We have seen judgments confirming that types of overtime and commission payments should be included in the holiday pay calculation. Increasing the salary bill in this way is not attractive to employers and it is possible that post Brexit domestic legislation will clearly define how holiday pay should be calculated and not allow further components e.g. shift premiums, to be included in the calculations.

2/ Freedom of movement

It is almost inevitable that current free rights of movement within the EU will become more challenging post Brexit once automatic free movement is removed. This will impact on:

- **The ability to recruit and retain non-UK nationals**
- **Hiring decisions now are likely to be influenced by nationality therefore creating a discrimination risk**
- **Uncertainty as to an individual's eligibility to remain in the UK and a risk of penalties through employing illegal workers.**

3/ TUPE: Transfer of undertakings

TUPE will usually apply where there is a transfer of business assets e.g. sale of company and where there is change in the service provider. Companies have felt restricted in their ability to complete transactions quickly due to the need to undertake employee consultations and post transfer restrictions on the ability to change employee contracts has caused frustration.

Whilst TUPE is here to stay there is an opportunity for a relaxation on the ability to harmonise terms of employment post transfer and to simplify employee consultation processes where redundancies are proposed.

The Taylor Review: Changing employment status and protections

The Taylor Review of Modern Working Practices, published on 11 July 2017, was delivered in the context of the need to adapt to changing employment structures. The recommendations on clarity of employee status and the extent of the scope of employment protections are much needed to allow employers the certainty they need to model their workforce in a way that works for them.

Employment status

The issues concerning employee status require the closest scrutiny to ascertain how far the re-classification of the workforce will require changes to remuneration, tax, benefits provision and statutory employment protections and entitlements.

Whilst it would not have been a surprise to see the Review recommend removing the three established categories of employee, worker and self-employed, an alternative proposal of introducing a new category of "dependent contractor" has been made which will largely replace worker status and retain a status framework which the Review considers "works reasonably well, but needs to adapt to reflect emerging business models, with greater clarity for individuals and employers".

A number of tests and factors are currently used to determine employment status and these include the degree of control exercised by the employer, the requirement to perform work personally and contractual obligations on both sides to provide and carry out the work.

The Review makes it clear that moving forward there will be clearer legislative principles which will apply in determining employment status and that will reduce the recent litigated employment status cases such as Uber, Pimlico Plumbers and Deliveroo.

Extending employment protections

The full suite of statutory employment protections e.g. unfair dismissal, notice periods, will remain available to employees but recognition of the growing number of non-employees who are likely to have dependent contractor status has led to the following Review recommendations:

- **Right to a written statement on commencement of employment for dependent contractors**
- **Higher National Minimum Wage for non-guaranteed hours contracts**
- **Ability to pay rolled up holiday in lieu of time off**
- **Agency workers will be able to request employment directly with the hirer**
- **Zero hours contracts workers will be able to request a contract to reflect actual hours worked**
- **Statutory sick pay to be paid as a basic employment right but subject to length of service conditions**
- **The threshold to request workplace representatives to be reduced from 10% of the workforce to 2%**
- **Gig economy workers providing services through apps and digital platforms to be paid a piece rate and to be given greater clarity as to when their "working time" for national minimum wage applies.**

The Review provides a detailed insight into the current and future world of work and the need to ensure employment law and practices protect and promote fair and decent work. A standardised floor of employment rights for all is some time away but the Review does show the need to provide protections to those individuals who choose to work outside the standard 9-5 employee model.

Gastric illness

Gastric illness claims – travel companies fight back

Michael Gwilliam
Partner, Plexus

Michael acts for insurance companies, tour operators, travel agents, accommodation suppliers, airlines and airports. He has over 25 years of experience in travel law. He is heavily involved in jurisdictional issues, in defending multi-party and group actions and in handling claims involving catastrophic loss and fatalities.

Tour operators offering all-inclusive package holidays have been battling a problem which has been much discussed. Over the last three years, there has been a reported increase in compensation claims for gastric illness of over 500% whilst over the same period, the actual number of sickness cases reported in resorts has either remained stable or gone down. This is a phenomenon only associated with UK holidaymakers and appears largely to be as a result of claims management companies (CMCs) encouraging holidaymakers to submit fraudulent or exaggerated claims and coaching people on what to say to make a claim. The result has been stark. One hotel association in Mallorca estimates that the cost to their members was £42 million last year alone. Hoteliers in Spain and Turkey have made noises about having to stop offering all-inclusive package to British tourists.

But has the tide now started to turn? If so, for what reason?

In July of this year, the Government launched a crackdown on false claims with Justice Secretary David Lidington announcing boldly: *"Our message to those who make false holiday sickness claims is clear – your actions are damaging and will not be tolerated. We are addressing this issue, and will continue to explore further steps we can take. This Government is absolutely determined to tackle the compensation culture which has penalised the honest majority for too long."*

A system under which only modest fixed costs are awarded to successful claimants already exists for most personal injury claims in England and Wales, but a loophole has been exploited in foreign holiday claims where costs remain uncontrolled.

To prevent this, ministers have asked the Civil Procedure Rule Committee, which is responsible for setting rules on court procedures, urgently to look at the rules governing the costs of holiday claims. As a result of these proposed changes, fixed recoverable costs may be extended to cover claims arising abroad, closing the loophole and meaning that pay-outs for tour operators will be subject to stricter controls.

This is very welcome news – and has been hard earned by an industry previously struggling under a tide of illness claims but which has come out fighting. However, it is only one part of a much bigger picture. Well coordinated and well publicised campaigns including ABTA's "Stop Sickness Scams" and Travel Weekly's "Fight Fake Claims" have doggedly gained traction and been picked up by the popular press.

Significantly too, there appears to have been an unconscious shift in the attitude of judges hearing these claims in courts nationwide. Whereas before it seemed to many that a claimant willing to swear on oath that they had been ill as a result of dodgy food served in resort some years ago was able too easily to overcome the burden of proof, these claims appear now to be subject to more rigorous scrutiny. Assisted by the comments on causation of Lord Justice Burnett in the Court of Appeal case of Wood v TUI that *"proving an episode of this sort was caused by food which was unfit is far from easy. It would not be enough to invite a court to draw an inference from the fact that someone was sick"*, it is clear in practice that many fewer of these claims are reaching the required standard of evidence and are being dismissed or discontinued.

How travel companies are fighting back

Claimants in the past could have been forgiven for believing that they had everything to gain but really nothing to lose in pushing their claims to court. No longer. Increasingly, tour operators successfully defending cases to trial are seeking a specific ruling that the claim was "fundamentally dishonest". This is a significant development as it allows them to enforce an order for wasted legal costs against a dishonest customer who will be left facing a bill of many thousands of pounds. As the Solicitors Regulation Authority (SRA) itself clearly spelled out to the legal profession in a strongly worded warning this month, *"solicitors do not help clients by bringing claims that have not been rigorously investigated, including consideration of adverse evidence"*, *"solicitors must… properly assess all of the evidence before submitting claims"* and *"lawyers should not bring cases, or continue with them, where there is a serious concern about the honesty or reliability of the evidence."*

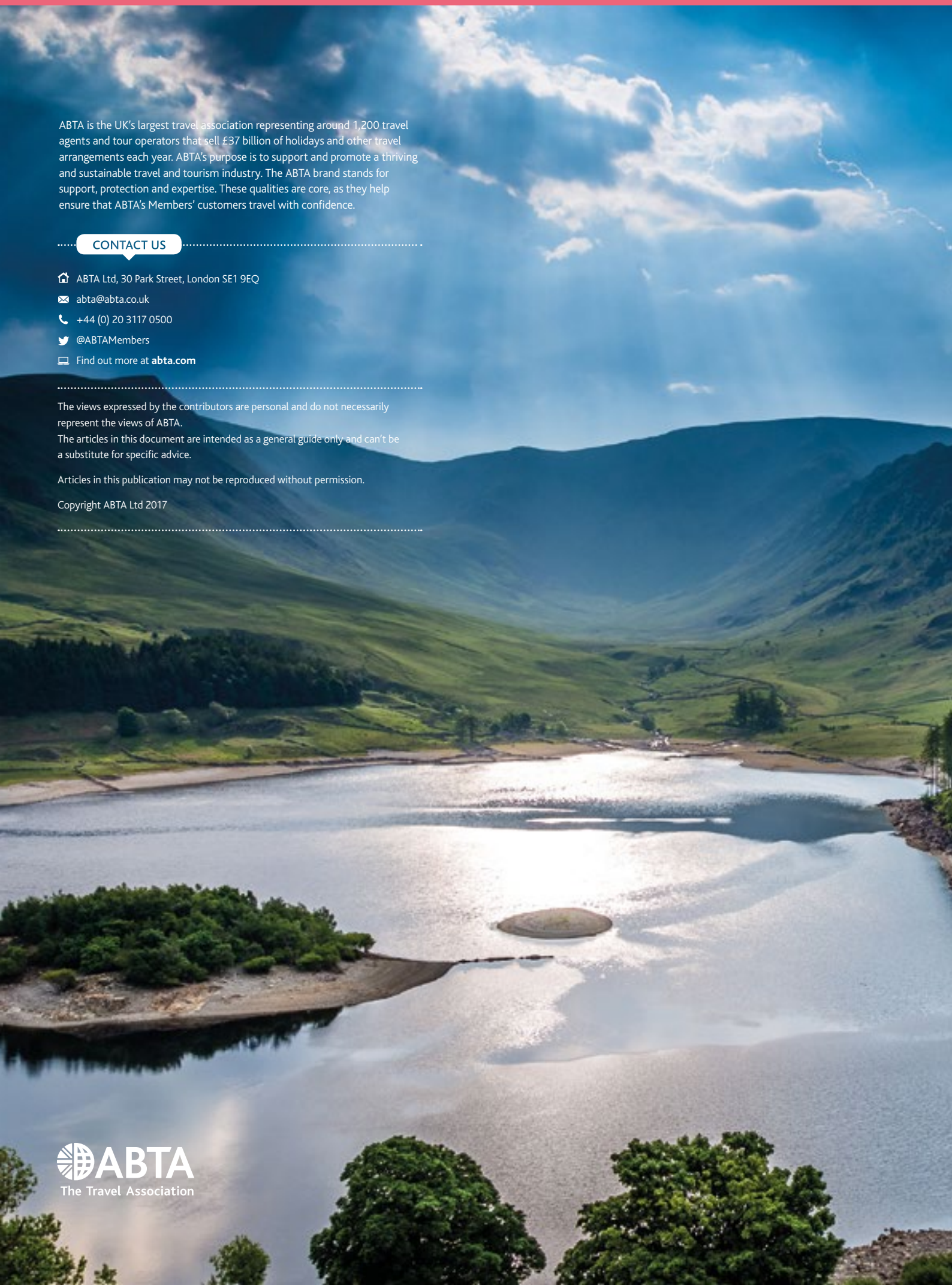
However, the story does not end there. Part and parcel of the industry's campaign has been to educate the travelling public about the full consequences of fraud.

Now they should be in no doubt that submitting a fraudulent claim is a criminal offence in the UK and could result in a criminal record and/or a financial penalty, which has recently happened when a couple were jailed in October 2017 for attempting to claim £20,000 in damages against Thomas Cook. Pursuing a fraudulent claim may also be illegal in the country where the holiday was taken.

It is reported that the SRA is currently investigating a number of law firms it suspects of having potentially improper links with CMCs over holiday sickness claims. In turn, the Claims Management Regulator has already stripped the licence from one CMC found to have encouraged holiday-goers to fabricate or embellish symptoms of gastric illness to get compensation. Evidence showed the firm had used deceptive sales scripts and had exaggerated expected payouts to entice consumers.

Keeping the momentum

It is undoubtedly true that there have always been claims for gastric illness and I am sure that will continue to be the case. I dare say that a number of them will even be genuine. However, there are encouraging signs that the unprecedented, unsustainable and, literally, unbelievable tide of less persuasive claims which has been seen over recent years is beginning to recede. That is not to say that the problem has already been solved but a good start has certainly been made and must be maintained. This resolute industry, unwilling to sit silently by, should be proud of the progress made to date in addressing and rebalancing this extraordinary onslaught.



ABTA is the UK's largest travel association representing around 1,200 travel agents and tour operators that sell £37 billion of holidays and other travel arrangements each year. ABTA's purpose is to support and promote a thriving and sustainable travel and tourism industry. The ABTA brand stands for support, protection and expertise. These qualities are core, as they help ensure that ABTA's Members' customers travel with confidence.

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